Supreme Court, U.S.
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No. 92-212

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

BARCLAYS BANK PLC,

Petitioner,

v.

FRANCHISE TAX BOARD, AN AGENCY OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR ORGANIZATION FOR INTERNATIONAL INVESTMENT INC. AND UNION OF INDUSTRIAL AND EMPLOYER'S CONFEDERATIONS OF EUROPE AS *AMICI CURIAE* IN SUPPORT OF *CERTIORARI*

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INTEREST OF AMICI CURIAE

The Organization for International Investment Inc. ("OFII") is a non-profit corporation the members of which are United States subsidiaries of foreign

shareholders.[1] The Union of Industrial and Employer's Confederations of Europe ("UNICE") is recognized as the official spokesman for European Business and industry vis-a-vis the European Economic Community and other European institutions.[2]

OFII members are domestic companies engaged in manufacturing, distributing goods, and performing services within the United States. OFII members export manufactured and processed goods and import various articles. OFII represents members' interests in matters of federal and State taxation and seeks legislative and judicial solutions to problems affecting economic interests of members. OFII members have a direct interest in the international aspects of the tax issues presented by this case. Similarly to the petitioners, OFII members bear an increased and discriminatory tax burden under California law. OFII members are treated as unitary with their foreign affiliated companies and are obliged to pay California taxes on foreign source income of companies that do not do business anywhere in the United States. California's scheme of worldwide taxation creates a substantial impediment to international commerce and to investment in the United States by foreign persons.

The member federations of UNICE are the official representatives of all sectors of business and industry in their respective nations. UNICE comprises thirty-two member federations from twenty-two European nations including all European Community and European Free Trade Association nations. UNICE's permanent secretariat is in Brussels, Belgium. An important objective of UNICE is to promote international commerce and investment by eliminating international double taxation.

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1. A list of OFII members is appended (Appendix I). Neither the petitioner nor any of its subsidiaries and affiliates are members of OFII.

2. A list of UNICE organizations is appended (Appendix II). UNICE is the Union's French acronym.

UNICE views California's taxation of foreign (to the U.S.) source income as a direct impediment to the flow of capital and intellectual property between the United States and the nations UNICE represents. UNICE is particularly concerned with the extraterritorial reach of California's unique tax method and with the fact that its worldwide application is entirely inconsistent with the longstanding, internationally agreed, arm's length standard.

SUMMARY OF ARGUMENT

This case involves the power of the State of California under the United States Constitution to contravene federal tax policy in foreign commerce. The federal government has adopted the international standard method of arm's length, separate entity accounting for division of taxable income among nations. California has adopted a worldwide, combined income apportionment method that cannot be reconciled with the federal and international method. The United States cannot conduct a coherent foreign economic policy in the face of these disparate and incompatible methods. The issue is which government's policy shall prevail.

This issue is ready for decision in this case.[3] Two years ago, this Court heard a case on the standing of foreign corporations to challenge the constitutionality of California's tax method.[4] Respondent, Franchise Tax Board, petitioner from an adverse United States Court of Appeals decision, argued that California courts provided the appropriate fora for hearing the issue of a State's constitutional power to tax foreign commerce. The Board's counsel earnestly contended that this Court should not presume that State courts would decline to

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3. The precise issue presented by this case was expressly left open for decision in an appropriate case by this Court in *Container Corp. v Franchise Tax Board,* 463 U.S. 159, 189, n. 26 (1983).

4. *Franchise Tax Board v Alcan Aluminium, Ltd.,* 493 U.S. 331 (1990).

follow this Court's mandates and refuse to consider the Foreign Commerce Clause issue. Counsel twice referred to this [*Barclays*] case as *the* State court case that best presented the issue.[5] Notwithstanding respondent's earlier contentions, the California Supreme Court has now declined to consider the Foreign Commerce Clause issue in the light of prior decisions of this Court.

Overruling the California District Court of Appeal which did consider the issue, the California Supreme Court substituted a novel analysis that elevates Congressional inaction to Congressional mandate.[6] Under this California approach, any State may establish policy affecting foreign commerce of the United States and even contravene federal foreign policy until told to stop by Congress. The California Supreme Court's decision ignores this Court's precedents and undermines federal policy in the sensitive area of foreign relations of the United States. This Court is now urged to hear this case to settle this issue finally.

ARGUMENT

A. USE OF WORLDWIDE COMBINED INCOME REPORTING BY A STATE IMPAIRS THE FEDERAL GOVERNMENT'S ABILITY TO CONDUCT FOREIGN RELATIONS.

The United States Government adopted the arm's length method many years ago[7] as its standard for allocating income among commonly controlled corporations doing business in more than one nation. This

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5. Excerpts from the transcript of oral argument in which these contentions were made are appended (Appendix III).

6. This was done on the basis of the California Supreme Court's reading of *Wardair Canada Inc. v Florida Dept. of Revenue* 477 U.S. 1 (1986), which this Court apparently did not find relevant in *Alcan*.

7. Foreign Investors Tax Act, Tit. I, P.L. 89-809, 89th Cong. 2d Sess. (1966), 80 Stat. 1539.

method is reflected in the Internal Revenue Code and is embodied in bilateral tax treaties to which the United States is a party.[8] The Unites States has, in fact, strongly advocated to other nations that the arm's length method is the most appropriate for allocating transnational income to a taxing nation.[9]

It is incontrovertible that worldwide, combined, income reporting for tax purposes is not compatible with the arm's-length method. The United States cannot seriously argue for a uniform standard to divide income among nations and expect other nations to abide by that standard if it is unenforceable even within the United States. The intrusion of worldwide combined reporting ". . . impair[s] the ability of the federal government to carry out its tax and investment policy in the international area" and "has seriously complicated [the United States'] economic relations with many of our closest allies."[10] Its use has been a source of conflict among nations that has already led to harm to the United States as a whole.[11] The purpose of a standard is to secure uniform treatment of United States business abroad as part of United States economic policy. The *quid pro quo* is uniform treatment of foreign business in the United States. This is not possible if California adheres to an incompatible standard.

The precise legal issue presented by this case is whether United States foreign policy as conducted by the Executive Branch, together with Congressional assent to that policy in the form of enabling legislation and

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8. Letter of Secretary of State Schultz to Governor Deukmejian, Petitioner's Appendix, F-44.

9. *Ibid.*

10. Schultz letter, *id.* at F-46

11. Letter of 30 June 1989, on behalf of the European Community, delivered to the Secretary of State by the Spanish Ambassador, reproduced and annexed as Appendix IV.

treaty ratification, is sufficient to invoke the protection of the Foreign Commerce Clause for that foreign policy.[12]

B. THIS CASE IS RIPE FOR IMMEDIATE DECISION. ITS RECORD CONTAINS ALL LEGAL AND FACTUAL MATTERS NEEDED TO RESOLVE THE CONSTITUTIONAL ISSUE IN FULLY DEVELOPED FORM AFTER TRIAL AND JUDGMENT ON THE MERITS WITH COMPLETE APPELLATE REVIEW BY STATE COURTS.

In 1984, two foreign corporations, Alcan Aluminium, Ltd. (Alcan) and Imperial Chemical Industries PLC (ICI), brought suit in United States District Court challenging California's authority under the Foreign Commerce Clause to impose franchise taxes based on worldwide combined reporting on the plaintiffs' domestic subsidiaries. The District Court dismissed the case on grounds that Alcan and Imperial as shareholders of the taxpayers, lacked standing to challenge tax liabilities of their subsidiaries. The United States Court of Appeals (Seventh Circuit) reversed and remanded for consideration of the merits of the constitutional issue. This Court granted *certiorari*.[13]

In brief and upon oral argument to this Court, the Franchise Tax Board vigorously contended that the Federal Tax Injunction Act, 28 U.S.C. § 1341, precluded a decision on the merits of the cases because the California courts provided a "plain, speedy and efficient remedy."[14] The Franchise Tax Board stated that any

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12. This is frequently referred to as the "dormant" Commerce Clause issue. The *Alcan* opinion, 493 U.S. at pp. 334-335, specifically referred to *Container Corp. v Franchise Tax Board,* 463 U.S. 159 (1983) and *Japan Line Ltd. v Los Angeles County,* 441 U.S. 434 (1979) as the controlling authorities.

13. *Franchise Tax Board v Alcan Aluminium, Ltd.,* 493 U.S. 331 (1990).

14. Franchise Tax Board's Petition for writ of Certiorari in *Alcan, supra* n.12, at pp. 20-23; Brief for the Petitioners, at pp. 41-48; Reply Brief of Petitioners at pp. 21-28.

attack on worldwide combined reporting must first be brought in the California courts and twice mentioned that this case, *Barclays*, was already pending there.[15] The Board argued that *Barclays* squarely presented the same Foreign Commerce Clause issues that Alcan and ICI were asserting. The Board also argued to this Court:[16]

> It cannot be presumed that, when confronted with a tax case involving a multinational enterprise, a state court will decline to follow the mandate of this Court and refuse to consider the issues raised by the Foreign Commerce Clause, i.e., whether the disputed tax creates an impermissible risk of double taxation or violates the "one voice" standard.

The California Supreme Court has, nevertheless, done precisely what the Franchise Tax Board said this Court should not presume that a State court would do – namely, decline to follow the mandate of this Court and refuse to consider the Foreign Commerce Clause issues raised by this case (*Barclays*). The California Court chose not to follow the dormant Commerce Clause analysis developed by this Court in *Container Corp.* and *Japan Line.*[17] The California court, rather, chose to read *Wardair Canada Inc.*[18] as a blanket permit removing the State's tax method from scrutiny in the absence of Congressional action expressly forbidding use of the method. This clearly contravenes the views expressed by this Court last term in striking down a State tax exclusively levied on foreign dividends.[19]

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15. Reply Brief of Petitioners on Writ of Certiorari, *Alcan*, pp. 21-28.

16. Petitioner's Reply Brief, *Alcan*, p.23.

17. *Supra,* n. 12.

18. *Supra,* n. 6.

19. *Kraft General Foods v Iowa,* ____ U.S. ____, 60 LW 4582, 4584 (#90-1918, 1992). The dissent, moreover, noted that the case did *not* involve a foreign entity and that the Executive Branch actually *supported* the State's power to levy the tax. It may be surmised, therefore, that both the majority and the dissent would have viewed the instant case more favorably to Petitioners.

This case now comes to this Court after eight years of litigation on these Foreign Commerce Clause issues in the California court system.[20] The record in this case was fully developed at trial, and the Foreign Commerce Clause issues were carefully considered and decided by the California Superior Court and the California Court of Appeal before reaching the California Supreme Court. The decision of the California Supreme Court is final on the Foreign Commerce Clause issue notwithstanding that court's remand of the separate Due Process claim that the Court of Appeal did not decide. The California Supreme Court has already begun to apply its decision to other litigants, and other California courts are bound to follows its precedent.[21]

It may be anticipated that the Respondent will again urge this Court to decline to review California's application of worldwide combined reporting in this case and to wait for more State proceedings or for another case.[22] The argument this time will be that the *Barclays* decision is not final because the Court of Appeal did not initially decide the Due Process issue.

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20. Five of those years were spent in the appellate process. The petitioners herein filed their complaint in Superior Court on 30 November 1984. The trial court filed its decision on 20 August 1987.

21. Order of the California Supreme Court to vacate and modify the opinion of the California Court of Appeal in *Colgate-Palmolive Co., Inc. v Franchise Tax Board* (18 June 1992).

22. The respondent, Franchise Tax Board, has managed to avoid a decision on the merits of this foreign commerce issue for more than ten years in both State and federal courts. See, *e.g., Capitol – Industries EMI, Inc. v Bennett,* 681 F.2d 1107 (9th Cir.), *cert. denied,* 459 U.S. 1087 (1982); *Shell Petroleum N.V. v Graves,* 570 F. Supp. 58 (N.D. Cal.), *aff'd* 709 F.2d 593 (9th Cir.), *cert. denied sub nom. Shell Petroleum N.V. v Franchetti,* 464 U.S. 1012 (1983); *Alcan Aluminium, supra,* n.4. This is the first case in which a foreign parent corporation, itself, has been able to claim standing in California courts as a "taxpayer." The California Supreme Court has declined to hear previous cases involving State and local taxation of foreign commerce. Both *Japan Line* and *Container Corp.* (*supra,* n.12) were appeals from lower California courts.

The Due Process issue is legally and factually severable from the Foreign Commerce Clause issue. The Due Process issue concerns a California regulation governing filing of returns by taxpayers subject to worldwide combined reporting and the fact that literal compliance with that regulation appears to be impossible. However that issue may finally be resolved, the California court system is finished with the Foreign Commerce Clause question.[23] That question will not be revisited by California whatever the outcome of the Due Process issue.[24]

The Foreign Commerce Clause issue presented by this case is too important to be delayed once again. Worldwide combined reporting continues to interfere with United States foreign policy, to offend the United States' trading partners, and to undercut important federal economic policies. The decision of the California Supreme Court is so patently inconsistent with this Court's prior decisions that it should not be allowed to cast a further shadow over the foreign relations and foreign commerce of the United States.

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23. The Respondent, the Franchise Tax Board, has required all taxpayers wishing to defer resolution of their administrative and court cases pending the outcome of *Barclays* to waive all issues other than the "one voice" Foreign Commerce Clause issue. Petitioner's Appendix, G-1. None of these taxpayers, consequently, can be affected by a decision on the Due Process issue. The Respondent clearly believes that only the Foreign Commerce issue is of importance in these cases.

24. The decision of the California court falls within the "fourth category" of cases meeting the finality requirement rescribed by this Court in *Cox Broadcasting Corp. v Cohn*, 420 U.S. 469, 482-85 (1975). The Foreign Commerce Clause issue has been finally decided in the State courts. Reversal of the State courts on this issue by this Court would preclude further litigation on any remaining issues in the case. Refusal by this Court to hear *Barclays* at this time would seriously erode federal policy and work a great hardship on the many other taxpayers whose cases are awaiting the outcome of the Foreign Commerce issue.

CONCLUSION

For the reasons stated, *amici curiae,* Organization For International Investment and Union of Industrial and Employer's Confederations of Europe urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

James Merle Carter
(Counsel of Record)

28 August 1992

APPENDIX

APPENDIX I

ORGANIZATION FOR INTERNATIONAL INVESTMENT INC.
CORPORATE MEMBERS

AKZO AMERICA, INC.
ALCAN ALUMINUM CORPORATION
ALLIED LYONS NORTH AMERICA CORPORATION
ASEA BROWN BOVERI, INC.
BASF CORPORATION
BATUS INC.
BET SERVICES
BNFL INC.
BP AMERICA CORPORATION
BRITISH AEROSPACE, INC.
BTR, INC.
BUNGE CORPORATION
CIBA-GEIGY CORPORATION
E.C.C. INTERNATIONAL, INC.
FINA OIL & CHEMICAL CO.
FUJITSU AMERICA, INC.
GLAXO INC.
GRAND METROPOLITAN INCORPORATED
GUINNESS AMERICA, INC.
HANSON INDUSTRIES
HITACHI AMERICA, LTD.
HOECHST-CELANESE CORPORATION
HOFFMANN-LA ROCHE, INC.
ICI AMERICAS INC.
LAFARGE CORPORATION
LVMH MOET HENNESSY LOUIS VUITTON
MARINE MIDLAND BANK, N.A.
MATSUSHITA ELECTRIC CORPORATION OF AMERICA
NESTLE USA, INC.
NORTH AMERICAN PHILIPS CORPORATION
PEARSON INC.
PECHINEY CORPORATION
PILKINGTON HOLDINGS, INC.
REED PUBLISHING (USA) INC.

RHONE-POULENC
ROLEX WATCH, U.S.A., INC.
RTZ AMERICA
SANDOZ CORPORATION
S.G. WARBURG & CO. INC.
SIEMENS CORPORATION
SMITHKLINE BEECHAM
SONY CORPORATION OF AMERICA
SOUTHLAND CORPORATION
THOMSON CONSUMER ELECTRONICS, INC.
THORN EMI NORTH AMERICA HOLDING, INC.
TOYOTA MOTOR SALES, U.S.A., INC.
UNILEVER UNITED STATES, INC.
VOLVO OF NORTH AMERICA CORPORATION

APPENDIX II
UNICE MEMBERS

Federation des Entreprises de Belgique (Belgium)
Danish Employers' Confederation (Denmark)
Federation of Danish Industries (Denmark)
Conseil National du Patronat Français (France)
Bundesvereinigung der Deutschen Arbeitgeberverbände – BDA (Germany)
Bundesverband der Deutschen Industrie – EDI (Germany)
Federation of Greek Industries (Greece)
Confederazione of Irish Industry – CII (Ireland)
Federation of Irish Employers – FIE (Ireland)
Confederation Generale dell' Industria Italiana – CONFINDUSTRIA (Italy)
Federation des Industriels Luxembourgeois (Luxembourg)
Verbond van Nederlandse Ondernemingen – VNO (Netherlands)
Nederlands Christelijk Werkgeversverbond – NCW (Netherlands)
Confederacion Espanola de Organizaciones Empresariales – CEOE (Spain)
Associaçao Industrial Portuguesa – AIP (Portugal)
Confederaçao da Industria Portuguesa – CIP (Portugal)
Confederation of British Industry – CBI (United Kingdom)
Vereinigung Osterreichischer Industrieler – VOI (Austria)
Confederation of Finnish Industries (Finland)
Finnish Employers' Confederation (Finland)
Federation of Icelandic Industries (Iceland)
Confederation of Icelandic Employers (Iceland)
Confederation of Norwegian Business and Industry (Norway)
Swedish Employers' Confederation (Sweden)
Federation of Swedish Industries (Sweden)

"Vorort" de l'Union Suisse du Commerce et de l'Industrie (Switzerland)
Union Centrale des Associations Patrocales Suisses (Switzerland)
Turkish Industrialists' and Businessmen's Association – TUSIAD (Turkey)
Turkish Confederation of Employer Associations – TISK (Turkey)
Employers & Industrialists Federation Cyprus (Cyprus)
Malta Federation of Industry – MFOI (Malta)
Associazione Nazionale dell'Industria Sammarinese (San Marino)

APPENDIX III

Extract pages from Oral Argument of Franchise Tax Board in No. 88-1400
Franchise Tax Board v. Alcan Aluminium Limited
1 November 1989

issues. But once they were in the federal courts and were confronted with a Tax Injunction Act, then they said well, the Tax Injunction Act can't apply to us because we have no plain, speedy or efficient remedies in the state courts.

QUESTION: Do they?

MR. LADDISH: They do, in effect, have plain, speedy and efficient remedies.

QUESTION: How? How?

MR. LADDISH: Through the fact that they are the sole stockholders of the taxpayers in this –

QUESTION: You think that the domestic subsidiary can raise the issues for them?

MR. LADDISH: Certainly, Your Honor. The – the domestic subsidiaries are the taxpayers. They are the parties that have been assessed the tax. What's put in issue in the –

QUESTION: You think they can raise the foreign commerce clause issues, the domestic subsidiary can?

MR. LADDISH: It – it's only common sense that they can, and also it's, if you look to what is going on in the California courts right now –

QUESTION: You don't think you would be in there arguing against that?

MR. LADDISH: Excuse me?

QUESTION: In the – you wouldn't be arguing against that in the state courts?

MR. LADDISH: Currently there are cases pending in the California state courts where the issues are being raised by subsidiaries –

QUESTION: And what position is the state taking on those? Is the state saying fine, we're going to litigate those issues?

MR. LADDISH: The state is taking the issue, as to some of them, the state is taking a procedural defense that they did not raise them in the claims for refund. But in no case is the state claiming that the subsidiaries cannot raise those foreign commerce claims. And we – we would be unsuccessful if we did try to raise that, because –

QUESTION: And how about the claim that it costs more for the parent?

MR. LADDISH: Those claims are being fully litigated in – in the state courts. In one case, the Barclay's case, I believe that is one of the issues where we are claiming that they did not raise that in the – in the claim for refund.

QUESTION: Do you think under California state tax law that the state could take the position that it can tax the parent, that the parent's the taxpayer?

MR. LADDISH: Not under the California state law, Your Honor, in that the California –

QUESTION: Well, it reads broadly enough. I mean, you take the position you can tax all their income.

foreign commerce clause in the situation we are here, for the reasons that I stated before, they are not one and the same. Certainly there are statutes that create injuries, and if you violate that statute you are injured. And it would be very hard to separate out the standing injury from the — from the decision on the merits. But that is not the case today. If it is determined that they do not have standing here, that does not mean that that does away with all the arguments that they are making as far as it being invalid under the foreign commerce clause. The taxpayers can make that argument and, as pointed out by one of the amici supporting the Respondents today, there are — there is litigation in the California courts that are raising these issues now, and one of the litigants is a subsidiary and the other one is an intervening parent; but the ultimate parent is not a part of the litigation.

QUESTION: I understand from your adversary to say the Ninth Circuit has decided that these issues can't be raised.

MR. LADDISH: The Ninth Circuit has only decided that as to the — the Ninth Circuit first decided that there was no standing. But as to the Tax Injunction Act, the Ninth Circuit decided, in a rather mechanical version, that the control that the sole stockholder would have over its taxpayer should not be considered by the court as giving it an effective remedy in the California courts. It just said since they cannot proceed

in their own name –

QUESTION: Well, you're arguing that it is an effective remedy.

MR. LADDISH: Yes, I certainly am, Your Honor.

QUESTION: So you are arguing the Ninth Circuit is wrong, as well as the Seventh?

MR. LADDISH: On that, yes. Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Laddish. The case is submitted.

(Whereupon, at 1:52 p.m., the case in the above-entitled matter was submitted.)

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APPENDIX IV

Letter From the European Community To The United States Government.

EL EMBAJADOR de ESPAÑA
WASHINGTON
June 30th, 1989

The Honorable
James A. Baker, III
Secretary of State
U.S. Department of State
Washington, D.C. 2520

Dear Sir:

The Member States of the European Community have noted that the United States Supreme Court is shortly to hear an appeal against the judgement of the Seventh Circuit Court of Appeals in Imperial Chemical Industries plc [sic] and Alcan Aluminium Limited v. California Franchise Tax Board.

The EC Member States consider this to be an appropriate opportunity to restate their opposition to the use of worldwide unitary tax by the State of California. They would urge the United States Government to confirm that, like the previous Administration they, too, are opposed to the use of worldwide unitary tax.

The views of the EC Member States on worldwide unitary tax are well known.* They consider that the imposition of this tax is inconsistent with the internationally accepted principles underlying the Tax Treatics and Friendship Treaties that individual Member States have entered into with the United States. Specifically, the use of the tax by the State of California:

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*Demarche of the EC Member States submitted to the U.S. Department of State; 19 March, 1980; 30 October, 1981; 29 June, 1982; 1 August, 1983; 23 September, 1983; 20 December, 1984; 8 August, 1985; 30 August, 1985.

i) contradicts the "arm's length" principal of allocating income of multi-national corporations between different national jurisdictions;

ii) may give rise to substantial double taxation;

iii) imposes a severe compliance burden by insisting on the restatement of accounts of different, but affiliated, corporations throughout the world even when they are not doing any business in California—accounts which were originally prepared to meet the specifications of the countries in which these corporations are resident;

iv) has perverse effects on the worldwide strategy of multi-national corporations (since, for example, a cost saving investment made in any country ouside the U.S., can increase the tax liability in Califronia, even if the California subsidiary is loss-making);

v) discriminates against companies doing business in California via subsidiaries, rather than through non-affiliated companies.

The EC Member States are strongly opposed to the attempt by California or any other State to impose taxation in income of foreign corporations arising outside the U.S.; to interfere with worldwide investment strategies, and to insist on burdensome compliance requirements on companies located outside the U.S.

EC Member States are aware that California has amended its legislation to allow multi-national companies to elect, on payment of a fee, to be taxed on a "water's edge", rather than worldwide unitary basis. However, since they are opposed to the use of worldwide unitary tax in principle, Member States cannot accept that it is right to insist on a fee as the price for electing to avoid worldwide unitary tax. Moreover, the process of making such an election involves substantial and unreasonable burdensome compliance costs.

The EC Member States, of course, support the case submitted by Imperial Chemical Industries and by Alcan Aluminium in the District Court and the Seventh Circuit Court of Appeal. They also very much endorse the *amicus* brief submitted by the U.S. in the District Court in ICI and Alcan v. California FTB. The EC Member States are aware that the issue currently before the Supreme Court is the question of the standing of the foreign parent companies to challenge the tax in the Federal courts, rather than the constitutionality of the tax itself. However, they believe the two issues to be inextricably interlinked. The EC Member States consider that worldwide unitary tax imposes an administrative and economic burden on foreign parent corporations and breaches the arm's length standard. Since the U.S. in its double taxation convention adheres to the internationally accepted arm's length principle, application of worldwide unitary tax by separate states of the U.S. prevents the U.S. from speaking with one voice when regulating commercial relations with foreign governments, and in the opinion of EC Member States is unconstitutional. The administrative and economic burden is imposed directly on foreign corporate parents and it is this constitutionally significant burden which creates standing for those foreign parents.

The Member States note and appreciate the U.S. Government's opposition to worldwide unitary tax. Given the importance of the present case before the Supreme Court, the Member States would urge the U.S. Government to reaffirm their commitment to the position taken by the previous Administration.

Sincerely,

/s/ Julian Santamaria

Julian Santamaria
Ambassador of Spain